LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 29 1973
MICHAEL RODAK, JR., CLE

NO. 73-851

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JAMES BATES, SR.,
Petitioner

VS.

STATE OF INDIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Of Counsel:
Ralph R. Blume
Stanley A. Levine
344 Utility Bldg.
Fort Wayne, Ind.
46802

Counsel for Petitioner:
Donald D. Doxsee
323 West Berry Street
Fort Wayne, Indiana 46802
Phone:
219-422-3436

November, 1973

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement of the Facts	4
Federal Question Raised in State Court.	5
Reasons for Granting Writ.	6
Conclusion	9
Appendix A - Opinion of the Court of Appeals	A-1
Appendix B - Petition for Re-Hearing.	B-1
Denial of Petition for Re-Hearing.	B-4
Appendix C - Petition for Transfer to Indiana Supreme Court.	C-1
Denial of Petition for Transfer	C-3
Appendix D - Sentence of Trial Court	D-1
Motion to Correct Errors.	D-2

AUTHORITIES

Cases:

Miranda v. Arizona (1966) 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 . 4, 5, 6, 7

Orozio v. Texas (1969) 394 U.S. 324, 22 L.Ed.2d 311, 89 S. Ct. 1095 . . . 6

Shreckloth v. Bustamonte (1973) ___ U.S. ___, 36 L.Ed.2d 854, 93 S.Ct.__ 6, 8

Constitutional Provisions:

Fifth Amendment
Sixth Amendment
Fourteenth Amendment

Statutes:

28 U.S.C. §1257(3) 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JAMES BATES, SR.,
Petitioner

VS.

STATE OF INDIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

The petitioner, JAMES BATES, SR., prays that a Writ of Certiorari issue to review the opinion and judgment of the Indiana Court of Appeals rendered in this proceeding on March 28, 1973. A timely petition for re-hearing was denied on May 9, 1973, and a timely petition for transfer to the Supreme Court of Indiana was denied without opinion on September 4, 1973.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals (Appendix A, pp. A-2 to A-7) was rendered on March 28, 1973, and is reported in ____ Ind. App. ____, 294 N.E.2d 185. The petition for re-hearing (Appendix B, pp. B-1 to B-3) was denied without opinion (Appendix B, p. B-4) on May 9, 1973. The petition for transfer to the Supreme Court

of Indiana (Appendix C, pp. C-1 to C-2) was denied without opinion (Appendix C, p. C-3) on September 4, 1973, and is not yet reported.

JURISDICTION

The order or judgment of the Indiana Court of Appeals was rendered March 28, 1973. A timely petition for re-hearing was filed and denied on May 9, 1973. A timely petition for transfer to the Supreme Court of Indiana was filed and denied without opinion on September 4, 1973. This petition is filed less than 90 days from the date of the Supreme Court of Indiana's denial of transfer. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

The petitioner was arrested on a warrant charging professional gambling. Prior to the petitioner's arrest two police officers operating undercover on two separate occasions had conversations with the petitioner. On neither of these occasions was the petitioner advised of his rights. Over the objections of petitioner's counsel, evidence as to those conversations was admitted into evidence.

The question presented then is whether the investigations had focused on the petitioner and whether the conversations constituted a custodial interrogation requiring that the petitioner be advised of his rights.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions:

(1) The Fifth Amendment to the Constitution of the United States, which provides as follows:

> "No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law . . ."

(2) The Sixth Amendment to the Constitution of the United States, which provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

(3) The Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE FACTS

On March 15 and 16, 1971, Officers Combs and Grant of the Indianapolis, Indiana, Police Department, acting as undercover agents for the Fort Wayne, Indiana, Police Department, went to Jones' Smoke Shop in Fort Wayne, Indiana, dressed in civilian clothes. The officers had been advised by the Fort Wayne Police that the petitioner was involved in selling numbers. On neither occasion did the officers advise the petitioner of his constitutional rights under the Miranda decision of this Court.

The officers testified that on both occasions they entered Jones' Smoke Shop by the front door, walked past a counter in the front room through a door to the back room and observed the petitioner sitting at a table.

Over the objection of counsel for the petitioner, Officers Combs and Grant testified as to the conversations they had with the petitioner about the alleged purchase of numbers slips and they introduced into evidence the purported numbers slips purchased during the conversations with petitioner.

Without the evidence of the officers as to the conversations with the petitioner and the purported numbers purchases, there could have been no conviction.

FEDERAL QUESTION RAISED IN STATE COURT

In the Circuit Court of Allen County: At the trial of this cause the federal question raised by this petition was raised by objections to the direct testimony of Officers Combs and Grant and by objections to the admission into evidence of the purported numbers slips purchased by Officers Combs and Grant. The objections to the testimony and evidence were specifically made on the bases of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and by the citation of the case of Miranda v. Arizona (1966) 384 U.S. 436, 86 S. Ct. 1602. The issue was preserved on appeal by the Motion to Correct Errors (Appendix D, pp. D-2 to D-5).

In the Indiana Court of Appeals: The question was preserved by the filing of the above-mentioned Motion to Correct Errors in the Indiana Court of Appeals and in the arguments and briefs filed with the Court. The petition was further preserved in the petition for re-hearing (Appendix B, pp. B-1 to B-3).

In the Supreme Court of Indiana: The federal question was preserved in the petitioner's petition to the Supreme Court of Indiana to accept transfer of the case (Appendix C, pp. C-1 to C-2).

REASONS FOR GRANTING WRIT

The court below has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court. The question involved is whether oral statements of a suspect obtained from him by undercover police officers following interrogation but prior to his arrest, are admissible against the suspect during his criminal trial on the charge resulting from the interrogation, although the accused had not been advised of constitutional rights to remain silent and to have the assistance of counsel as set forth in this Court's holdings in Miranda v. Arizona (1966) 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694, and Orozio v. Texas (1969) 394 U.S. 324, 22 L.Ed.2d. 311, 89 S. Ct. 1095, and Schreckloth v. Bustamonte (1973) ___ U.S. ___, 36 L.Ed.2d. 854, 93 S. Ct. ___.

The question presented concerns the problem of undercover police officers obtaining sought after incriminating statements from suspects prior to their arrest or physical custody by the police and then using these statements against the suspect without any effort whatsoever to obtain from the suspect any express or implied waiver of his right to remain silent and to have the assistance of counsel.

It is clear and undisputed from the State's evidence in this case that petitioner's statements were not the result of a "general on-the-scene questioning", but were indeed the result of a planned and intentional inquiry by police into the activities of this particular suspect which was obviously designed to obtain his arrest and conviction.

It is also obvious from the evidence that your petitioner did not speak spontaneously or voluntarily nor did he manifest any desire to give a confession of his acitivities in the sale of "numbers", illegal in the State of Indiana.

The statements obtained by the undercover police were coerced or "tricked" out of your petitioner by subterfuge and device and as such cannot be considered a voluntary confession constitutionally admissible, perhaps even under the pre-Miranda authority of this Court, but surely not after.

The Court of Appeals of Indiana in sustaining the trial court's admission into evidence of your petitioner's out-of-court statements cites at length from Miranda v. State of Arizona, supra, at page 187 and then holds:

> The above language is clear that "[t]he requirements of warning and waiver imposed by Miranda v. [State of] Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, apply only to custodial interrogation." New v State (1970), 254 Ind. 307, at 314, 259 N.E.2d 696 at 700.
>
> In the instant case, there is no evidence of "custodial interrogation", the freedom of Bates was not restrained. On both March 15, 1971, and March 16, 1971, Bates was free to sell numbers, or not to sell numbers, to the police. He chose the former. Miranda does not require suppression of any of the evidence in this cause.

From this language it is submitted that the only criteria used by the Indiana Court was to determine whether there was an arrest or other physical restraint of your petitioner. There was no effort by the Court to consider whether your petitioner's freedom of action had been deprived in any significant manner other than by physical control or arrest as such. In addition, the Indiana Court made no effort to find or rely on any express or implied waiver of your petitioner's right to remain silent and to have the assistance of counsel as required by this Court's opinion in Schneckloth v. Bustamonte (1973), supra.

The crucial point in this petition is that your petitioner was given no choice to waive or not to waive his rights and as a matter of fact was coerced by trickery and subterfuge into making incriminating statements and these statements were used against him at his trial to convict him. The question then is whether this type of coercion and undercover interrogation relieves the police of their obligation to give suspects the "Miranda" warnings. To maintain that his freedom of action was not in any diminished, as was held by the Indiana Court of Appeals, is to deny reality. This means that undercover police officers are free to interrogate suspects at any time and any place without giving the warnings, but other officers are not. This reduces the issues of "waiver" and "fair trial" simply to matter of form and ignores the significant, substantive constitutional rights here involved.

It is submitted that the admission of your petitioner's statements to undercover police officers into evidence over

the objection of counsel as being in violation of the principles set forth in Miranda, supra, is crucial and prejudicial to petitioner, in that these statements were necessary to establish the intent to engage in "professional gambling" which is the crime charged and for which your petitioner was convicted. Your petitioner's statements to the undercover officers were specifically cited, quoted, and relied on in the Indiana Court of Appeals decision below, ___ Ind. App. ___, 294 N.E.2d 186, 187 (Appendix A, pp. A-1 to A-7).

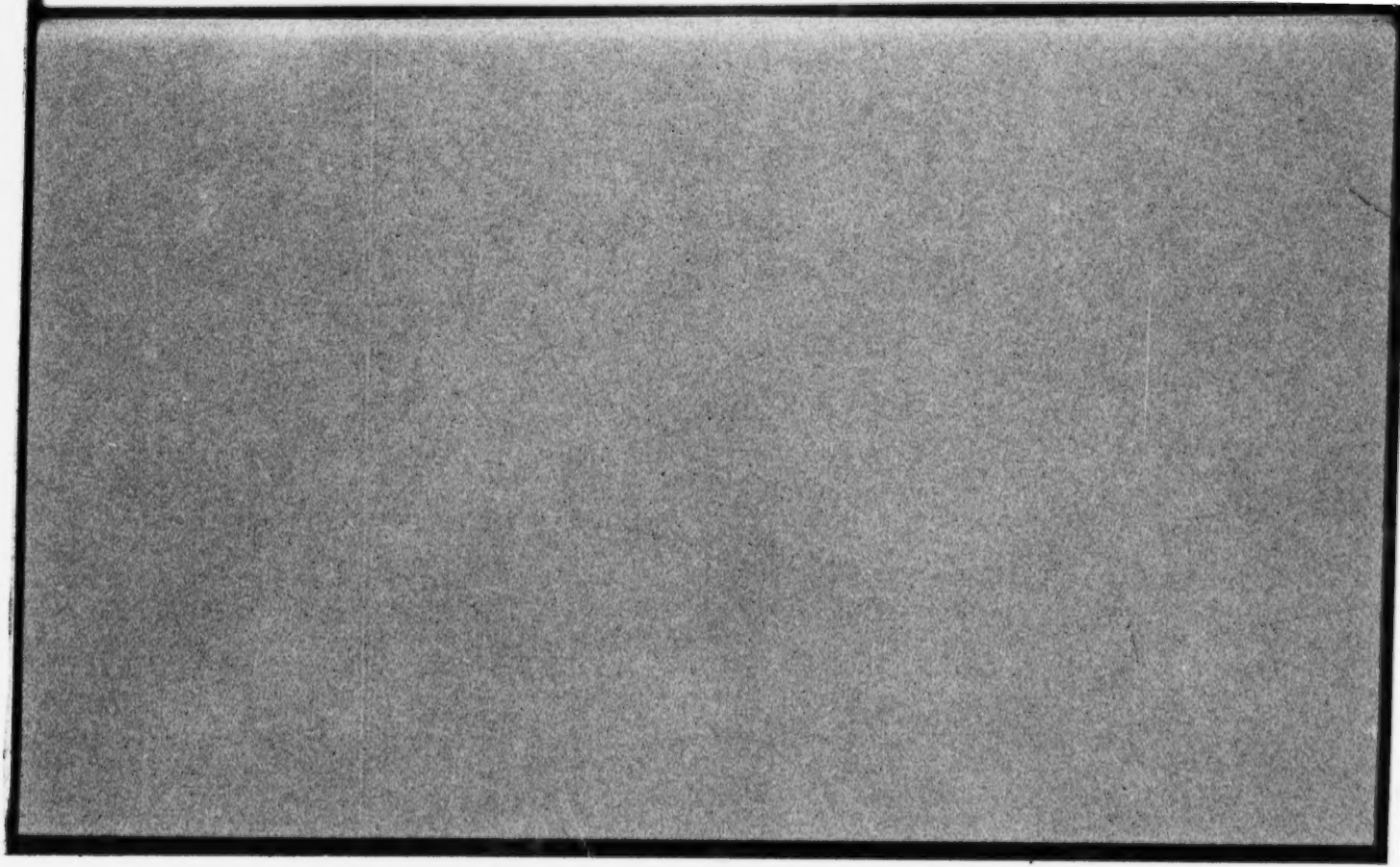
CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Donald D. Doxsee
Attorney for Petitioner

November 28, 1973



STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE
INDIANAPOLIS, INDIANA 46204
TELEPHONE 633-5200

NO. 3-972A61

James Bates Sr. V. State of Indiana

You are hereby notified that the Court of Appeal has on this day issued the enclosed Opinion.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 28th day of March, 1973.

/s/ Billie R. McCullough
Clerk Supreme Court and Court of Appeals

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

JAMES BATES, SR., Defendant-Appellant	)	
V.	)	No. 3-972-A-61
STATE OF INDIANA, Plaintiff-Appellee	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
HONORABLE JACK P. DUNTEN, SPECIAL JUDGE

HOFFMAN, CHIEF JUDGE.

The primary issue presented by this appeal is whether sufficient evidence was presented to sustain the conviction of defendant-appellant James Bates, Sr. for professional gambling.

Bates was charged by affidavit with the crime of professional gambling. Trial was to the court without the intervention of a jury. Bates was found guilty of the crime of professional gambling as charged in the affidavit, and sentenced to the Indiana State Farm for a period of six months and fined in the penal sum of $500. Bates filed his motion to correct errors which was overruled by the trial court and this appeal followed.

The evidence in the record before us

most favorable to the finding of the trial court is as follows:

On March 15, 1971, Police Officers Richard Combs and George Grant of the Indianapolis Police Department were in Fort Wayne, Indiana, to "assist the Fort Wayne Police Department in the investigation of numbers." Between seven and eight A.M. on that morning Officers Combs and Grant, dressed in civilian clothes, entered the Jones Smoke Shop in Fort Wayne. Upon entering the premises they observed two people in the front and one gentlemen in the back part of the premises. Bates was sitting at a table in the back of the building writing bank clearing numbers which are numbers corresponding to the daily stock market average.

Combs asked Bates for four numbers. Bates said, "Hell, man, I don't know ya." Combs identified himself as being from Indianapolis and Bates proceeded to write the four numbers for which Combs paid two dollars.

Another man then entered the building who said, "I'm in a hurry, I've gotta get my numbers in so I can get out of here." Bates wrote a number for this man. Bates then wrote two numbers for Officer Grant for which Grant paid Bates eighty cents.

On the following day, March 16, 1971, at

7:40 A.M. Grant and Combs again entered the Jones Smoke Shop. Bates was sitting at the table in the rear of the building writing numbers. Bates wrote two numbers for Combs for which Combs paid one dollar, and two numbers for Grant, for which Grant paid fifty cents.

Combs testified that the only conversation on the second day was as follows:

> "I just told him that if I hit, I want my money, and he (Bates) said 'You'll get your money.'"

On appeal, Bates argues that his conviction is not supported by sufficient evidence.

The scope of review to be applied by this court was recently stated in Priola v. State (1973), ___Ind. _____, 292 N.E. 2d 604, at 605, as follows:

> "Initially, we must again reiterate that when we are called upon to decide an appeal concerning the sufficiency of the evidence of a conviction we will not weigh the evidence nor resolve questions of credibility of witnesses, but will look to that evidence and the reasonable inferences therefrom which support the findings of the trial court. Smith v. State (1970), 254 Ind. 401, 260 N.E. 2d 558. The conviction will be affirmed if from that viewpoint there is evidence of probative value from which a jury could reasonably infer that the appellant was guilty beyond a reasonable doubt. Turner v. State

(1972), Ind., 287 N.E. 2d 339."

The crime of professional gambling is defined in IC 1971, 35-25-1-2(3), Ind. Ann. Stat. § 10-2330(3) (Burns 1972 Cum. Supp.), as follows:

> "(3) 'Professional gambling' means accepting or offering to accept, for personal gain or profit, money, credits, deposits of other things of value risked in gambling, or any claims thereon or interest therein. Without limiting the generality of this definition, the following shall be included: poolselling and bookmaking; maintaining slot machines, one-ball machines or variants thereof, pinball machines which award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money merchandise pushcards, punchboards, jars or spindles, in any place accessible to the public; and conducting lotteries, gift enterprises, or policy or numbers games, or selling chances therein; and the following shall be presumed to be included: conducting any banking or percentage games played with cards, dice or counters, or accepting any fixed share of the stakes therein."

The foregoing evidence and reasonable inferences flowing therefrom provide a sufficient probative basis from which the trial court could find that Bates was guilty beyond a reasonable doubt of each element of the offense charged. We will not disturb that

finding.

The second contention argued by Bates is that the trial court erred in admitting into evidence certain statements made by the defendant and the numbers slips obtained from him because the police officers did not advise Bates of his rights under Miranda v. State of Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694.

In Miranda, at 478-479 of 384 U.S., at 1630 of 86 S.Ct., at 726 of 16 L.Ed. 2d, it is stated:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights

> must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (Footnote omitted.)

The above language is clear that "(t)he requirements of warning and waiver imposed by Miranda v. (State of) Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, apply only to custodial interrogation." New v. State (1970), 254 Ind. 307, at 314, 259 N.E. 2d 696, at 700.

In the instant case, there is no evidence of "custodial interrogation." The freedom of Bates was not restrained. On both March 15, 1971 and March 16, 1971, Bates was free to sell numbers, or not to sell numbers, to the police. He chose the former. Miranda does not require suppression of any of the evidence in this cause.

The judgment of conviction appealed from is affirmed.

AFFIRMED.

SHARP and STATON, JJ. CONCUR.

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

JAMES BATES, SR. , NO. 3-972-A-61
Defendant-Appellant

VS.

STATE OF INDIANA,
Plaintiff-Appellee

APPELLANT'S PETITION FOR REHEARING

The Appellant petitions the Court to grant a rehearing in the above-entitled cause.

The Appellant respectfully represents that the Court erred in its opinion and decision in the following respects:

1. The opinion of this Court contravenes a ruling precedent of the United States Supreme Court and the Supreme Court of Indiana as stated in opinions in the following cases:

Miranda v. Arizona (1966) 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694

Noel v. State (1971) ____ Ind. ____, 274 N.E. 2d 245

Dickerson v. State (1972) ___Ind. _____, 276 N.E. 2d 845

The ruling precedent is that Miranda warnings must be given when the individual is first subjected to police interrogation at the point that he is deprived of his "freedom of

action in any significant way", whether or not such police questioning occurs while the individual is "in custody" at the police station or any other place or location. For the individual's answers to be admissible in evidence over Miranda objections they must have been made "freely, voluntarily, and spontaneously" and not made in response to police interrogation in the course of a police investigation in an answer-compelling atmosphere, whether such atmosphere is created directly or by trick and subterfuge.

That said ruling precedent was contravened by the Court in this case as shown by the following language contained in the opinion of this Court:

> The above language is clear that "(t)he requirements of warning and waiver imposed by Miranda v. (State of) Arizona (1966) 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694, apply only to custodial interrogation." New v. State (1970) 254 Ind. 307, at 314, 259 N.E. 2d 696, at 700.
>
> In the instant case, there is no evidence of "custodial interrogation". The freedom of Bates was not restrained. On both March 15, 1971 and March 16, 1971, Bates was free to sell numbers, or not to sell numbers, to the police. He chose the former. Miranda does not require suppression of any of the evidence in this cause.

/s/ Ralph R. Blume
Ralph R. Blume
344 Utility Building
Fort Wayne, Indiana 46802
219-423-3525
Attorney for Appellant-
Defendant

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE
INDIANAPOLIS, INDIANA 46204
TELEPHONE 633-5200

NO. 3-972A61

James Bates, Sr. V. State of Indiana

You are hereby notifed that the Indiana Court of Appeals has on this day Denied Appellant's Petition for Rehearing without Opinion.

Hoffman, Jr. C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 9th day of May, 1973.

(SEAL)

/S/Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

IN THE
SUPREME COURT OF INDIANA

JAMES BATES, SR.
Defendant-Appellant

VS. NO. 3-972A61

STATE OF INDIANA
Plaintiff-Appellee

APPELLANT'S PETITION FOR TRANSFER

The Appellant petitions the Supreme Court to transfer this cause to said Supreme Court for review and in support of his petition states the following pursuant to Appellate Rule 11(B)(1) and (2):

1. The Indiana Court of Appeals decided this case with a written opinion filed on the 28th day of March, 1973.

2. The decision of the Court of Appeals was against this appellant.

3. That a petition for rehearing was filed with the Court of Appeals in time on April 17, 1973, and that a rehearing was denied on the 9th day of May, 1973.

4. That the decision of the Court of Appeals is in error in that it contravenes a ruling precedent of this Court as stated in the cases of Noel v. State (1971) ____ Ind. _____, 274 N.E. 2d 245, and Dickerson v. State (1972) ____ Ind. _____, 276 N.E.

2d 845, in which this Court held that the Miranda warnings must be given when the individual is first subjected to police interrogation at the point that he is deprived of his "freedom of action in any significant way", whether or not such police questioning occurs while the individual is "in custody" at the police station or any other place or location. In addition, to be admissible in evidence over Miranda objections the statements and answers of those interrogated must have been made "freely, voluntarily, and spontaneously" and not in response to police interrogation in an answer-compelling atmosphere. Contrary to these precedents the Indiana Court of Appeals has ruled that the requirement for Miranda warnings and their waiver apply only to "custodial interrogation" when physical freedom of movement is actually restrained by the interrogating police officers.

/s/ Ralph R. Blume
Ralph R. Blume
344 Utility Building
Fort Wayne, Indiana 46802
219-423-3525
Attorney for Defendant-Appellant

STATE OF INDIANA
CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
BILLIE R. McCULLOUGH, CLERK
217 STATE HOUSE
INDIANAPOLIS, INDIANA 46204
TELEPHONE 633-5200

NO. 3-972A61

James Bates, Sr. V. State of Indiana

You are hereby notified that the Indiana Supreme Court has on this day Denied Appellant's Petition to Transfer. Prentice, Acting C.J.
All Justices Concur

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 4th day of September, 1973.

(SEAL)

/S/ BILLIE R. McCULLOUGH
Clerk Supreme Court and
Court of Appeals

STATE OF INDIANA) IN THE ALLEN CIRCUIT
) SS: COURT
COUNTY OF ALLEN) CAUSE NO. 14654

STATE OF INDIANA

VS.

JAMES BATES

SENTENCING

It is, therefore, ordered, adjudged and decreed by the Court that defendant, James Bates, Sr., is guilty of the offense of professional gambling, as charged in the affidavit, that he be and he is hereby sentenced to the Indiana State Farm for a period of six (6) months, and that he be fined in the penal sum of Five Hundred ($500) Dollars, and that he pay and satisfy the costs herein taxed. (TR. p. 51, l. 18 to l. 26.)

/s/ Jack P. Dunten
The Honorable Jack P. Dunten,
Special Judge

STATE OF INDIANA) IN THE ALLEN CIRCUIT
)SS: COURT
COUNTY OF ALLEN) CAUSE NO. 14654

STATE OF INDIANA

VS.

JAMES BATES

DEFENDANT'S MOTION TO CORRECT ERRORS

Comes now the Defendant James Bates and files herewith the following Motion to Correct Errors as follows:

1. The decision of the Court is not supported by sufficient evidence upon all necessary elements of the crime of "professional gambling" as charged in the Affidavit filed herein, in that:

A. The State failed to prove beyond a reasonable doubt that the Defendant:

(1) Knowingly engaged in professional gambling;

(2) Accepted or offered to accept money or other things of value risked in gambling;

(3) Accepted money or other things for a profit;

(4) Affected the public by any activity on his part;

(5) Owned, controlled, and maintained gambling lotteries or numbers games or sold chances

therein.

8. The State failed to present evidence in this case, one based solely on circumstantial evidence, which was so conclusive in character or which pointed so surely and unerringly to the guilt of the Defendant that every reasonable hypothesis of innocence was excluded.

2. Uncorrected error of law occurred and was properly raised in the proceedings at the trial in that:

The Court admitted into evidence certain statements of the Defendant and slips of paper obtained by the police officers from the Defendant over the timely objection of the Defendant and such evidence was obtained without the police officers having first advised the Defendant of his Constitutional rights to remain silent and to have the assistance of counsel, all as required by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

STATEMENT OF FACTS AND GROUNDS

1. As to the specification of error in Paragraphs 1A and 1B above, the facts and grounds are:

> The only evidence introduced by the State during the course of the trial involved a single isolated incident in which police officers

paid the Defendant a few cents and they obtained in return slips of paper bearing numbers which they had quoted to the Defendant. This evidence is clearly not sufficient to prove that Defendant was engaged in professional gambling as alleged in the Affidavit filed in this cause; and is not so conclusive in character nor does it so surely and unerringly point to the guilt of the Defendant as to exclude every reasonable hypothesis of Defendant's innocence in this pure case of circumstantial evidence.

2. As to the specification of error in Paragraph 2 above, the facts and grounds are:

During the course of the trial of this cause to the Court, the Court over the timely objection of the Defendant, admitted into evidence certain figures written thereon by Defendant, and other actions and statements of Defendant, which were induced and obtained by the police officers acting in their official capacity during an investigation of Defendant by the officers at a time when Defendant was significantly deprived of his freedom of action and before he had been advised of his Constitutional rights to remain silent and to have the assistance of counsel; all as required by the United States Supreme Court in its decision in Miranda v. Arizona (1966) 384 U.S. 436.

WHEREFORE, Defendant prays that this Court grant Defendant's Motion to Correct Errors and enter a dismissal of this cause of

of action.

BLUME, WYNEKEN, LEVINE & CLIFFORD

BY: /s/ Ralph R. Blume

Ralph R. Blume
344 Utility Building
Fort Wayne, Indiana 46802
Phone: 219-423-3525

SUPREME COURT U. S.
JAN 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-851

JAMES BATES, SR.,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE L. SENDAK
Attorney General of Indiana

WESLEY T. WILSON
Deputy Attorney General

Attorneys for Respondent

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6335

Central Publishing Company, Inc., Indianapolis, Ind. 46206

IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-851

JAMES BATES, SR.,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals of Indiana is reported in 294 N.E. 2d 185.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Petitioner, who was suspected of professional gambling but was not under arrest or restraint, must have received Miranda warnings to entitle conversations between petitioner and incognito policemen to be admissible into evidence.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Articles of Amendment I, VI, and XIV, are correctly set forth on pages 3 and 4 of the Petition.

STATEMENT OF THE CASE

On March 15, 1971, Indianapolis Police officers Richard Combs and George Grant went to Fort Wayne, Indiana, to assist the Fort Wayne Police Department in the investigation of numbers gambling in that city (Tr. p. 68). On the morning of March 15, 1971, between 7:00 and 8:00 a.m. the police officers were wearing civilian clothes. They went to the Jones Smoke Shop at 1918 S. Lafayette Street (Tr. pp. 68, 69). The petitioner was sitting at a table at the back of the shop writing bank clearing numbers (Tr. p. 69).

Officer Combs approached the petitioner, identified himself by his driver's license, and asked for four numbers. Petitioner gave him the numbers and received two dollars in payment (Tr. pp. 71-74). Later Officer Grant wrote two numbers for a bet of eighty cents (Tr. p. 89).

On the morning of March 16, 1971, the officers again went to the smoke shop and made further numbers bets with Petitioner (Tr. pp. 78-96).

Subsequently, Petitioner was arrested by Fort Wayne police for professional gambling. At the trial officers Combs and Grant testified, over Petitioner's objection, about their transactions with Petitioner and their conversations with him.

SUMMARY OF ARGUMENT

There was no error in admitting in evidence the testimony of Officers Grant and Combs concerning their transactions and conversations with Petitioner because:

1. Petitioner was not under arrest or any form of restraint whatever.

2. There was no coercion used to obtain the evidence.

3. The alleged trickery of the officers did not disqualify them from testimony.

ARGUMENT

THERE WAS NO ERROR IN ADMITTING IN EVIDENCE THE TESTIMONY OF OFFICERS GRANT AND COMBS CONCERNING THEIR TRANSACTIONS, AND CONVERSATIONS WITH PETITIONER.

The petitioner argues that the police officers from Indianapolis must have given him *Miranda* warnings before permitting him to commit the crime of professional gambling in their presence. However, *Miranda* concerns custodial interrogation, and Petitioner was not subjected to custodial interrogation. He was not subjected to any interrogation whatsoever. He was not questioned concerning crimes he was suspected of having committed nor was he questioned about any crimes in general. He was merely permitted to commit this particular crime in the officers' presence. The officers wore no uniforms or badges and for all intents and purposes they were not police officers. They were more than one hundred and fifty miles from their jurisdiction and had no authority in Fort Wayne. In addition, Petitioner was under no coercion whatever. He was not yielding to the compelling authority of the law. He was in his usual place of business and was as free from coercion as possible for any individual.

Petitioner made no confession or statement concerning past crimes. He simply accepted bets from the police officers on two separate occasions and said no more than was necessary to consummate the transactions.

Petitioner speaks of trickery and subterfuge, but the police practices used here have been recognized as the

legitimate tools of criminal investigation for as long as there have been detectives. If the officers had walked in wearing their police uniforms, or if they had informed the Petitioner of their identity as police officers or the purpose of their visits, Petitioner would have been very law-abiding—at least until the officers left.

Schneckloth v. Bustamonte (1973), 36 L.Ed. 2d 854, 93 S.Ct. 2041, cited as authority at pages 6 and 8 of the Petition, involved the Fourth and Fourteenth Amendments to the Constitution of the United States. However, the Fourth Amendment which is not involved in this case, and the Fifth and Sixth Amendments, which Petitioner charges were violated here, were not involved in *Schneckcloth v. Bustamonte.* This Court was very clear in that case when it said at page 2059:

> "Our decision today is a narrow one. We hold only that when the *subject of a search* is not in custody and the State attempts to *justify* a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (Emphasis added.)

Petitioner argues that he was "given no choice to waive or not to waive his rights." But this Court and the State would ask, What rights? Does the petitioner have a "right" to commit the crime of selling numbers?

Petitioner interpretes the language of the Court of Appeals below at page 187 to limit its consideration to possible arrest or physical restraint of Petitioner at the time the Indianapolis detectives entered into gambling transactions with him. However, the court said, "the freedom of Bates was not restrained" at that time.

Petitioner states, "To maintain that his freedom of action was not in any way diminished, as was held by the Indiana Court of Appeals, is to deny reality". Petitioner fails to point out or even faintly suggest the nature of any restraint under which he was placed. He was in his own place of business or, at least, the place where he customarily did business, and he was doing business without any interference from any one. No one made any threats of any nature either express or implied. The two out-of-town police officers exhibited nothing to suggest authority to Petitioner and he had no reason to suspect that they were anything other than what they seemed: Two civilian gamblers from Indianapolis.

Petitioner condemns the holding of the Court of Appeals with the words, "This means that undercover police officers are free to interrogate suspects at any time and any place without giving the warnings, but other officers are not." Again, it must be re-emphasized that *there was no interrogation* of the Petitioner in this cause. Even if there had been, the consequence of the court's holding as deduced by Petitioner in the sentence quoted above are not so unreasonable. The rules regarding custodial interrogation are designed, not to give the defendant a greater chance to defeat the forces of the law (as though the whole procedure were a sport!), but because obtaining statements by coercion raises a serious doubt as to their verity. Those rules evolved out of a long history of cases in which an accused was physically tortured until he confessed to anything of which he was accused. However, that has not been the state of the law for generations.

The type of undercover work such as used in this case, i.e. where no coercion is used but the officers operate incognito and gain the confidence of the suspect in order to observe his natural operations, uninfluenced by

consciousness of the presence of law officers, has been approved by this Court in many decisions. *Sorells v. United States,* 287 U.S. 435, 41 L.Ed. 224, 53 S.Ct. 210, 86 A.L.R. 249; *Osborn v. United States* (1967), 385 U.S. 323, 17 L.Ed. 2d 312, 87 S.Ct. 429. See generally 21 *Am. Jur.* 2d, *Criminal Law,* §§ 143-145.

Petitioner's suggestion that he should have been offered an opportunity to obtain counsel before the out-of-town incognito police officers placed bets with him is absurd. What could an attorney have told him that he did not already know? The only sincere advice any attorney could have given him would have been: Don't do it! Petitioner surely knew that already. He knowingly broke the law and took his chances.

CONCLUSION

For the foregoing reasons it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WESLEY T. WILSON
Deputy Attorney General

Attorneys for Respondent

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6335